No. 15.

Brf. of Atty. Gen. for U.S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 15.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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STATEMENT.

The court has directed the argument at this hearing to the question whether, assuming the diamonds to have been dutiable, the district court erred in any of its rulings in respect of what constitutes the crime of smuggling, and in the application of the law to the evidence. The verdict of the jury (Rec., p. 12) was that the defendant is guilty in manner and form as indicted. Although

it is understood from the court's order that the question is to be considered mainly with reference to the crime of smuggling as provided for in section 2865, Revised Statutes, the first count of the indictment, based upon section 3082, which is directed against importation contrary to law, is herewith quoted, as well as the second count, based upon section 2865 (Rec., pp. 1, 2):

> The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations, respectively, do present that heretofore, to wit, upon the eleventh day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds of great value, to wit, of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.
>
> 2. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations do further present that afterwards, to wit, upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, and unlawfully, and with

intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

The fifth point for the defendant (Rec., pp. 110, 111 requested the court below to charge that—

> Although they [the jury] believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his stateroom on the steamer *Rhyland*, where they remained until said Captain Loesewitz was called upon to deliver same

> to Revenue-Officer Gallen, and that when delivered to Revenue-Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty.

The court refused to affirm this point.

Defendant's sixth point (Rec., p. 111) requested an instruction that—

> As the first count in each bill of indictment insufficiently states any crime against the laws of the United States, said first count in each bill of indictment is to be entirely ignored by them and not considered.

which was refused.

The eighth point (Rec., ib.) requested an instruction—

> That the second count in each bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the statute upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein, therefore your verdict must be not guilty upon the second count of both bills of indictment.

The court disaffirmed this point.

The tenth point (Rec., pp. 111, 112) was in these words:

> The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A

> preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.

The court's answer to this point (Rec., p. 112) was as follows:

> The court affirms the tenth point generally, but the meaning ascribed to it by the court is that the jury shall be fully convinced from a careful examination of all the testimony heard that the defendant is guilty of the smuggling charged, as testified to by Captain Loesewitz, and that if it is so convinced beyond room for reasonable doubt it will be justified in finding a verdict of guilty generally and should do so. If it is not thus convinced the defendant is entitled to an acquittal and should be acquitted.

By the answer of the court to the defendant's ninth point (Rec., p. 111), and in the charge (id., p. 112), the jury were instructed to scrutinize the testimony of Captain Loesewitz and to consider any interest or bias which he might have, and it is clear that the portions of the charge relative to the evidence of good character and upon reasonable doubt (Rec., p. 113) were correct and satisfactory.

The assignments of error specified error in certain rulings of the court as to admission or rejection of testimony (Rec., pp. 114, 115, 116), some of which, however, were not duly excepted to by the defendant, but these relate mainly to the credibility of one of the Government witnesses and to a certain hypothesis of the defendant's innocence, and do not touch the questions now before the court.

The remaining portions of the charge relative to the present issue are as follows:

> The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged. You have only to determine, therefore, whether it is true. * * * There are two indictments and a number of counts in each. If the defendant is found on the evidence to have committed the offense charged in any of the counts, he may be returned guilty in manner and form as he stands indicted.

The statutes involved in the case are:

> SEC. 2865, R. S. If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom-house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisonment for any term of time not exceeding two years, or both, at the discretion of the court.
>
> SEC. 3082. If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to

> law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.

Substantially, then, the sole question before the court is, What constitutes the crime of smuggling? What acts and transactions, what omissions and situations, does the crime of "smuggling" comprehend as sufficient to constitute the offense; are the facts in this case such as to fall fairly within a proper definition of the crime of smuggling? In short, what is the crime of smuggling?

ARGUMENT.

I.

Before we discuss the subject under the language of section 2865, it is submitted that the crimes and offenses aimed at by section 3082 plainly include the acts established in this case. Smuggling is one of many forms of importation contrary to law, or, rather, is a comprehensive term including a whole series of criminal acts and omissions respecting importations; and all or nearly all these allied offenses have their appropriate prohibition

and penalty in the statutes, and therefore we contend that it would not do to say that because smuggling is provided against in section 2865 it can not be comprehended under section 3082. All forms of illegal importation are forbidden or provided against in the statutes, and upon this argument no form of illegal importation contrary to law would fall under section 3082 unless, perhaps, the importation of prohibited goods.

The case of *U. S.* v. *Thomas* (4 Ben., 370) intimates that section 3082 is to be applied only to prohibited goods, and *U. S.* v. *Claflin* (13 Blatchf., 178) may be held to support that view, but Justice Strong, in *U. S.* v. *Nine Trunks* (27 Fed. Cas., 161), disapproves of the restriction in the Thomas Case, and is of opinion that dutiable goods were in contemplation of Congress as much as goods which could not legally be imported at all. It is true that at the time of this decision section 2865 was not incorporated in the statutes in its present form, but the decision does not suggest that section 3082 would not apply, because the facts shown might embrace other offenses punished by existing laws.

The proper view would appear to be that all or most frauds upon the customs revenue are of the same inherent nature—that all are allied to smuggling and are different forms of importation contrary to law. As was said by the court in *United States* v. *67 Packages of Dry Goods* (17 How., 85, 93): "The latter [i. e., the passing or attempting to pass goods through the custom-house with intent to defraud the revenue by means of a false, forged, or fraudulent entry] is an offense which in effect and result is very much akin to that of smuggling, except

done under color of conformity to the law and regulations of the customs."

It may be well to point out here that while in *United States* v. *Stockwell* (13 Wall., 531, 551) the court held that the act of 1866 (sec. 3082) was strictly penal and not at all remedial, being avowedly enacted further to prevent smuggling, and that therefore it did not substitute new penalties for those imposed by former acts, but punished as a crime that which before had subjected its perpetrator to civil or quasi-civil liability. In another Claflin case (an action of debt for the penalty, 14 Blatch., 155), upon review in this court (97 U. S., 546, 552 553), the court held that although the act of 1866 was not remedial in the sense of authorizing a civil action, it not only had in view punishment of the offense described, but, by its denouncement of forfeiture, indemnity to the Government for loss sustained in consequence of the criminal offense. "The fine and imprisonment were superadded as a vindication of public justice." See also opinion of Judge Blatchford in *In re Leszynsky*, (16 Blatchf., 9, 14).

The conclusion, then, is that the facts proved herein constitute under the first count of the indictment a fraudulent importation contrary to law, within the meaning of section 3082.

II.

It will be proper to examine the question as it is presented under section 2865, somewhat in detail, in the light of definition, history, and legal decisions, with a consideration of various statutes affecting it.

1. DEFINITION.

The lexicons may be divided roughly into three classes—those which make the test of the crime *importation* contrary to law, or with intent to evade the payment of duties; those which regard the landing or bringing on shore of the goods as an essential element; and those which emphasize the secret and clandestine method appropriate to the offense. As the subject properly starts with the English common law definitions they may be given here:

> Smuggling consists in the bringing on shore, or carrying from the shore, goods and merchandise for which the duty has not been paid or of goods of which the importation or exportation is prohibited. (6 Bacon's Abridgment, 5th ed., p. 258.)
>
> Smuggling consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandise for which the duty has not been paid or of goods of which the importation or exportation is prohibited. (1 Hawkins' Pleas of the Crown, 8th ed., p. 661.)
>
> Among the offenses against the revenue laws that of smuggling is one of the principal. It consists in bringing on shore, or carrying from the shore, goods, wares, or merchandise for which the duty has not been paid, or goods of which the importation or exportation is prohibited. (1 Russell on Crimes, 9th ed., p. 172.)

The industry of opposing counsel has now brought forward a fourth English authority, which is obscure and without great weight, that smuggling consists in clandestinely bringing on shore goods, etc.

Following this classification, Dr. Johnson defines the verb *to smuggle* as follows: "To import or export goods

without paying the customs;" and *smuggler* as "a wretch who, in defiance of justice and the laws, imports or exports goods either contraband or without paying the customs."

So, Webster: "To import or export secretly or contrary to law; or secretly to import or export without paying the duties imposed by law; to run, as to smuggle lace. To convey or introduce clandestinely." To the same effect are the Encyclopædic Dictionary, which also defines *smuggling* as "the act or practice of importing or exporting contraband or dutiable goods secretly and without paying the duties imposed by law; the act or practice of defrauding the revenue by importing or exporting goods clandestinely without payment of the duties imposed on them;" the Imperial Dictionary; the Century Dictionary, which further defines *smuggling* as the "offense of carrying or causing to be carried across the boundary of a nation or district goods which are dutiable, either without paying the duties or allowing the goods to be subjected to the revenue laws;" and to the same effect is Worcester. Encyclopædia Britannica: "Smuggling denotes a breach of the revenue laws either by the importation or the exportation of prohibited goods or by the evasion of customs duties on goods liable to duty."

The second class embraces, as stated, the definitions which are assimilated to the common-law statement, such as McCulloch's Commercial Dictionary (vol. 2, p. 515), which defines smuggling as the offense of defrauding the revenue by introduction of articles into consumption without paying the duties chargeable on them. It might, of course, be said that any authority which used the phrase

"without payment of the duties" instead of "by the evasion of duties," or some equivalent alternative form of words, is to be placed in this class, e. g., The Standard Dictionary, "to take merchandise into or out of a country against a legal prohibition, or without payment of the duties prescribed by law." But wherever the word "import" is used this view is negatived, and the phrase "without paying the duties," or similar phrases, must be held equivalent to "without allowing the goods to be subjected to the revenue laws."

In the third class the etymology of the word is emphasized as coming from Anglo-Saxon and allied originals, meaning to *creep* or to *slip into*. Thus, Stormonth: To bring goods into or convey goods out of a country secretly, in order to escape payment of the legal duties; to convey clandestinely; *smuggling*, the offense of passing goods into or out of a country without paying the legal duties. So the Penny Cyclopedia, vol. 22, p. 158: "Smuggling is the clandestine introduction of prohibited goods, or the illicit introduction of goods by the evasion of legal duties." The secret and clandestine element appears, indeed, in some form in nearly all the definitions, both as respects the technical offense and in the more general and derived sense of the term.

It will be said that these definitions are general, and are not to be taken as defining the *crime*. The nature of the question is such, and the range of transactions comprehended so broad, that herein it differs perhaps from murder, and some other crimes, in reference to which the essential elements are narrowed, so that, both in ordinary

and in technical use, the import is the same. But the general rule is that the ordinary use and meaning of a term controls its legal acceptation, and, consistently with the rule of strict construction in reference to crimes, the usual view and employment of the terms here will aid us in discovering whether the apparent restriction of the English common law definition is now effective.

Even the early law dictionaries, like Jacobs' and Tomlins', ignore the common law distinction, and as to the American law dictionaries, Bouvier's definition is: "*Smuggling:* The fraudulent taking into a country or out of it merchandise which is lawfully prohibited;" and Anderson's: "*Smuggle:* The act, with intent to defraud, of bringing or attempting to bring into the United States dutiable articles without passing them, or the packages containing them, through the custom-house or submitting them to the officers of the revenue for examination. Implies something illegal and is inconsistent with an innocent intent. Conveys the idea of a secret introduction of goods with intent to avoid payment of duties." Abbott's definition of smuggling is substantially the same.

The Supreme Court in the case of *United States* v. *Dunbar* (156 U. S., 185) clearly approves Bouvier's definition of smuggling.

Moreover, common-law authorities are not well established or unanimous. Sir J. F. Stephen, in the first volume of his History of the Criminal Law of England (p. 219), points out that common-law crimes and their definitions and distinctions were unsettled in England until the period between Coke and Blackstone, and then began to be established.

Hawkins, upon whose statement the common-law definition is founded, flourished in the latter part of the seventeenth and the early part of the eighteenth centuries.

H. J. Stephen, in his Summary of the Criminal Law (p. 89), defines smuggling as follows: "This offense consists in importing or exporting goods without paying the duties imposed thereon by the laws of the customs and excise, or of which the importation or exportation is prohibited," citing 1 Russ., 117.

Lord Hume, in his Commentaries on the Law of Scotland (Edinburgh, 1844, vol. 1, pp. 488 *et seq.*), defines "smuggling" as "importing goods from abroad without payment of the duties laid thereon by national authority toward the aid of the public service. This sort of trespass, which in all its shapes exposes the offender to pecuniary penalties and forfeiture of the goods, has in the more audacious modes of it been found necessary to be repressed with chastisements of a higher kind." He then proceeds to discuss the statutes from the time of George I, chiefly in reference to unlawful assemblies, and the assaulting and beating of officers and the running of goods. It seems that the more serious offenses were originally punished by death; then by transportation; and finally by imprisonment, with or without hard labor.

Bell's Dictionary of the Law of Scotland, page 225, defines contraband goods as those which are imported or exported without paying the duties imposed by law; and smuggling as the making, transferring, importing, or exporting of goods without paying the duties to Government and with the intention of defrauding the revenue (p. 768).

Irish treatises (Hayes's Crimes and Punishments; Archer's Digest; Brunker's Digest) seem to regard the various customs consolidation acts as merging and including all previous offenses relative to the customs revenue. No reference has been found in any of the Scotch or Irish authorities to the "common-law crime of smuggling."

We therefore contend that the common-law definition rests substantially upon the statement of a single treatise, is not supported by the authorities, and is not to be regarded as firmly fixed.

It thus appears from the foregoing that the later authorities on definition, both general and legal, take an enlarged view of the offense as compared with the earlier common-law authorities, and substantially hold, as we are contending, that in order to constitute the crime of smuggling it is only necessary that the goods should be brought within the jurisdiction, and that the crime includes the attempting to bring, as well as the bringing, of the goods without passing them through the custom-house or submitting them for examination. We shall endeavor to explain why this enlarged view is necessary and proper, and how it has been developed.

2. HISTORICAL.

It is not necessary to seek the beginnings of the crime, which is probably as old as any restrictions of municipal law on trade or by Government imposition of tolls, but confine ourselves to the comparatively modern period of the last two hundred years. The importation and exportation of base coin in England, as early as the fourteenth

century, was joined with the counterfeiting of "Lushboroughs" as an offense against the Crown prerogatives; and in the fifteenth century the evasion of import and export duties by smugglers, as later of excise duties, was an increasing complaint in the administration of justice. In the eighteenth century, as piracy declined, smuggling was made a substitute for it and engaged the criminal activities of those who formerly would have been rovers; and at the end of the eighteenth and the beginning of the nineteenth century smuggling was probably the most conspicuous crime in England. The coast dwellers were naturally smugglers, and looked upon the Government customs and excise officials as mortal enemies, and considered that they had as good right to be "fair traders" as any men to exercise their own vocation.

A long list of methods of evasion was met by equally numerous and intricate preventive regulations, but the statutes increased to little effect. The motive to the crime, of course, resides in tariffs; as they were reduced or abandoned the offenses declined, and the English experience under Walpole, Pelham, and Pitt taught the lesson that reduction of duties was more effective than preventive statutes, although the latter were not without effect, because the crime had begun to decline before duties were substantially reduced. But, generally, the change in respect of rate of duties from earlier times, when the rate per cent *ad valorem* ran into the hundreds, has largely caused the crime, as it was formerly practiced, to disappear. From the point of view of his theory of taxation, Adam Smith's famous defense of smuggling

arose, that while a smuggler is "no doubt highly blamable for violating the laws of his country, he is frequently incapable of violating those of natural justice, and would have been in every respect an excellent citizen had not the laws of his country made that a crime which nature never meant to be so." But every swindler might find equal justification, and say that his particular form of *malum prohibitum* is to be disregarded because it is not *malum per se*. Indeed, the line is often hard to draw, and this offense is in effect a breaking of the eighth commandment. The first requisite for civilized man is obedience to the laws, and the remedy is not to break but to change them. (See Pike's History of Crime in England, Dowell's History of Taxation, and the Encyclopædia Britannica.)

The reason why so little light upon our point, comparatively speaking, is to be found in the reports may be that in the former days of the lugger and the vigilant revenue force, if a smuggler were taken red-handed anywhere within the marine belt the forfeiture of vessel and goods and the condemnation and execution of the offender followed as matter of course, and few defendants considered it worth while to appeal.

What is the difference between the modern situation as to acts and methods of smuggling and the case in former days? Then it was impossible to guard effectually a long and sparsely settled coast line; means of communication and of transmission of intelligence were scanty and slow; smuggling operations were conducted consequently with boldness, although their clandestine and evasive

nature was inherent, and, as the actual landing of the goods at some remote place, under cover of night, or even openly by day and with the connivance and help of neighboring inhabitants and confederates, occurred in the vast majority of cases, the element of landing, being a pretty uniform fact in the crime, came to be fixed unconsciously, so to speak, in the old definition. This is believed to be true, because of the almost universal fact, notwithstanding the fact that as a rule no words become fixed and established in a law by accident and without purpose and meaning.

At the present day the case is essentially changed (although border and coast smuggling at unprotected points is by no means unknown), because the frontier and coast guard is much more effective, communication of intelligence and transportation is easy and rapid, the motives to the crime, by the reduction of duties, is largely restricted to articles of great value in small bulk, like those in the present case, and the methods prevalent have abandoned the old violent and semipiratical conditions and proceed through fraudulent invoice, undervaluation, false entry, and clandestine introduction by all manner of concealments and evasions on the largest steamers to the most populous ports. In other words, cunning and secrecy, which evade the authorities, and a sort of legerdemain by which officials are hoodwinked and smuggling is carried on, so to speak, under the very eyes of the law, have succeeded to the desperate acts and hardihood of former days.

The characteristic quality of the offense being its secret and clandestine nature, and the gravamen being

the intentional evasion of duties and consequent fraud upon the Government, can it be reasonably urged that the test is the actual physical presence of the goods on the shore and that a deliberate intention to land and evade the payment of duties, not remaining in intention merely, but so far carried out that a few steps across a gang plank would have finally consummated it—from which all presumption of innocence has fled, and in which no stool of repentance for the chief offender can find a place—is not sufficient to establish the crime? We use the inartificial phrase "finally consummated," because the crossing the gang plank with the diamonds would have been a final act or sequel and would have followed in due course; the *crime* had already been consummated.

The presumably unconscious agent was not thinking of a *locus penitentiæ*, nor could such an act of contrition be attributed to his principal, even if it had been in the former's intention; but it can not be doubted, from the testimony of Captain Loesewitz (Rec., p. 27), that he was prepared to deliver the diamonds to Keck's supposed messengers, and that as soon as he left the ship they would have been shipped to Cincinnati. Does the law, which here and in England has for a long time given officials authority to stop and search vessels and vehicles, and has subjected uncustomed goods found therein to seizure and forfeiture, say in effect to the Government: "You must make a choice in any given case; you can not both forfeit and prosecute as to the same goods; or, while you may proceed against the master on account of goods unmanifested, or against the owner of goods concealed, you can not in such case proceed against the

smuggler for the crime? In case you seize before unshipping, he has not committed a crime. You must wait and let him come ashore if you wish to pursue that course."

Must the Government run the risk of losing duties and of failing to prevent smuggling; must the right to search and seize before a landing be practically abandoned, or else the Government be lax in vindicating the sanctions of the criminal law? Must its duty to collect its revenues and its duty to punish crime be arrayed against each other? Are these offenses slight and the fraud hardly criminal, amounting only to a breach or evasion of an implied contract with Government? On the contrary, we earnestly urge that the provisions as to search and forfeiture not only gave increased means for seizing and forfeiting goods, but are entirely consistent with, and, indeed, imply, an intent to detect the crime of smuggling and punish it as such.

3. REVIEW OF STATUTES.

a. English.

There were stringent enactments against smuggling and fraudulent practices in customs in the time of Elizabeth, reciting that greedy and covetous persons convey merchandise out of creeks where no customer is resident, or through corruption of the customer, and by divers fraudulent practices import and export goods without payment or agreement for payment of the customs and subsidies due. (Dowell's Hist. Tax., vol. 1, pp. 165, 166.)

The act of 13 & 14 Car. II, c. 11, sections 4 and 7, authorizes search of ships and imposes a fine on officers of vessels who suffer packages aboard ship in port to be opened and the contents to be embezzled, and makes it an offense to take merchandise from shore to a vessel for export, or from a vessel for import without the presence of a customs officer. Various acts of the time of George IV, William IV, and Victoria (1 Geo. IV, c. 43; 6 Geo. IV, c. 108; 3 and 4 W. IV, c. 53; 4 and 5 W. IV, c. 13; 8 and 9 Vic., c. 87; 16 and 17 Vic., c. 107), impose penalties on persons found on board ship liable to forfeiture as being within a certain distance of shore with goods liable to forfeiture, and for assisting in unshipping such goods; forfeit boats made use of in removal of illicit goods or having double sides or bottoms; forfeit prohibited goods; authorize searches and seizures; forbid the importation of prohibited goods and the unshipping of goods liable to duties, customs not having first been paid; direct prohibitions and forfeitures against passengers concealing goods and persons concerned in unshipping prohibited or uncustomed goods; and apply more severe punishment to such acts as making signals to smuggling vessels at sea, assembling with firearms to assist in illegal importation or exportation, and resisting navy or revenue force.

The customs consolidation act of 1876 (39 and 40 Vic., c. 36), which consolidates and amends previous statutes, provides *inter alia* (sec. 177) that if any goods subject to any duty or restriction in respect to importation shall be found, either before or after landing, to have been concealed on board any ship, such goods shall

be forfeited. (Sec. 178) All goods, the importation of which is restricted, admissible to duty, and found or seized under the customs act, shall, for the purpose of proceeding for forfeiture or for any penalty incurred in respect of them, be deemed to be goods liable to be unshipped without payment of duties unless the contrary be proved.

Section 182 authorizes search of ships for prohibited or uncustomed goods within the limits of any port of the United Kingdom. By section 184 any person may be searched if the officers have good reason to suppose that such person is carrying uncustomed goods about his person. By section 186 every person who shall import or bring, or be concerned in bringing, into the United Kingdom any prohibited goods or any goods the importation of which is restricted, whether the same be unshipped or not; * * * with intent to defraud Her Majesty of any duties due thereon, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties or of the laws and restrictions relating to importation * * * shall, for each offense, forfeit treble the value of the goods or £100. By section 237, when any conviction shall be had against any person for an offense against the customs act, and he shall have been adjudged to pay a penalty exceeding £100, he may be committed for the first offense to prison for not less than six nor more than nine months, and for a subsequent offense may be imprisoned in jail or the house of correction, with or without hard labor, for a period not less than six nor more than twelve months.

b. United States.

The United States statutes have followed in the main the English regulations not only as to invoice and entry and detection of frauds connected therewith, but in the delimitation of various offenses embraced in smuggling and the granting of authority to officials and the imposition of forfeiture of goods and penalties. The acts of July 31, 1789 (1 Stat., 29), August 4, 1790 (1 id., 145), and March 2, 1799 (id., 627), regulated and provided more effectually for the collection of duties on imports and imposed forfeiture for goods not duly invoiced, authorized search for goods arriving upon vessels upon suspicion of fraud, provided penalties for concealing goods, required prompt report of arrival of a vessel, the production of correct manifests, forfeited goods not on the manifest, established penalties for breaches of these and other requirements of the law as to unlading, invoice, entry, baggage of passengers, etc., and laid down forms and a course of procedure.

The act of March 2, 1821 (3 Stat., 616), regulated the entry of merchandise from any adjacent territory, requiring a manifest and forfeiting the goods and the vessel or vehicle if there were refusal or neglect to deliver a manifest. The act of March 3, 1823 (id., 781), amending the latter act, changed the penalty thereunder, and made it an offense to receive, conceal, or buy goods known to have been illegally imported, and to forcibly resist an officer of the customs in the execution of his duty. The tariff act of August 30, 1842 (5 Stat., 548), section 19 of which, as amended by the act of February 27, 1877

(19 Stat., 247), appears as section 2865, Revised Statutes, reenacted by section 26 (p. 586) all regulations, restrictions, and penalties of existing laws not inconsistent with the act.

The act of June 27, 1864 (13 Stat., 197), was entitled "An act to prevent smuggling, and for other purposes," and provided for unloading and inspection of goods and baggage imported from a contiguous foreign country, and for forfeiture of dutiable articles found on the vessel or vehicle which the owner or person in charge refused to submit to the customs officer. The act of February 28, 1865 (id., 441), reviving the provisions of the act of March 3, 1815 (3 Stat., 231), provided for stopping and searching vehicles and persons traveling on foot or on beasts of burden on which goods subject to duty, or which shall have been introduced into the United States in any manner contrary to law, are suspected; and also provided for search of buildings near the boundary line of the United States, for forfeiture of goods found and removal of the building, and for conviction and punishment of the persons receiving or depositing goods in such building, or aiding therein.

The act of July 18, 1866 (14 Stat., 178), of which section 4 has become section 3082, Revised Statutes, reenacts and renders more stringent the previous laws as to search and seizure of vessels, vehicles, goods, and baggage by officers of customs and other persons authorized, and contains the provision (section 2) that if it shall appear that any breach of law has been committed whereby vessel or goods are liable to forfeiture, it shall be lawful to arrest any person engaged in such breach, and again

imposes penalties for forcible resistance and for other offenses; the remaining portions of the act relate mainly to procedure as to claims upon property seized, to remission of fines and forfeitures, to regulations concerning vessels, and to penalties for bribery.

There are other allied acts, not, however, necessary to notice particularly, except the Anti-Moiety act of 1874, which will be considered hereafter, but it may be remarked finally as to this statutory review that the administration of customs law and procedure, as distinguished from the laying of duties and detection and punishment of offenses (which subjects were indiscriminately embraced in the earlier acts to regulate the collection of duties), was ultimately separated in the Customs Administrative act of June 10, 1890, as amended by section 32 of the act of July 24, 1897 (30 Stat., 214), although penalties and punishments appropriate to this branch of the revenue laws are imposed under this act (see secs. 9, 17, 26, 27). Most of the offenses now embraced in the subject are to be found in Title XXIV, Revised Statutes, especially in chapters 4, 5, and 7, regarding entry, unloading, and enforcement of laws and punishment for violations, and in the Customs Administrative act.

It appears that little light upon the present question is to be obtained from the civil law, and it is to be remembered that the theory and inspiration of Anglo-Saxon and civil law, respectively, are often divergent and repugnant.

It is evident, from provisions running through English and American statutes, that the true theory of the

crime is that it includes many separate and different offenses; that it is a continuing series of acts, or consists of successive steps; that it may be arrested at any stage and punished, not as if still resting in mere intention, but because its nature is such that scrutiny and detection must be directed over a long range, and if the series of steps must be fully completed before the combined and aggravated offense is consummated, before the crime is complete, the arm of justice is really paralyzed. Mere omission, quiescence, the failure to take certain prescribed steps are often the form the crime takes, which accentuates the necessity of scrutiny and punitive measures over a constantly changing condition of affairs; and so the laws generally have penalized the beginnings of smuggling, or the being in a position to smuggle, and punish acts, omissions, concealment, and secrecy, as the failure to obtain a consular certificate, the being found within a certain distance of the coast with goods subject to duties or restrictions and intended to be "run," not declaring dutiable goods in baggage, concealing, and the like.

These things all go to show that it has always been considered that the illegal acts in smuggling operations may be commenced before an unshipment. Moreover, most of the provisions look to the detection of attempts before a successful completion, and accordingly provide machinery therefor, rights of search, presence of customs officials when unloading into a lighter, or at landing of baggage. Most of the statutes seem to contemplate the detection of smugglers in the act, and their punishment accordingly, though, of course, there are always pro-

visions covering the completed result and the harboring of smuggled goods.

In the case of boats proceeding from the middle line of boundary waters, or vehicles transported on ferryboats plying on such waters, or crossing on bridges connecting the United States with contiguous foreign countries and seized before they are actually landed in the United States, or have reached the shore, would the right of the United States end with forfeiture? Would not the owners or persons in charge of the goods be criminals, within section 2865, caught in the act? These instances are not so strong as that of a vessel arriving from abroad and actually tied up to the dock; that is, arrived at the shore of the United States.

4. DECISIONS.

(A) *English.*—We are aware of the distinction between proceedings for seizure and forfeiture of goods and for fines and penalties on the one hand, and prosecution for crimes on the other. The rule of strict construction is, of course, applicable to both, for forfeiture proceedings are criminal in their nature rather than remedial, yet it may be held to apply more strictly in reference to crimes. However, the consideration of some cases involving the question of forfeiture among others will throw light upon the subject before us.

The case of *Wilson* v. *Saunders* (1 B. & P., 267) was an action of trespass for seizing goods which had been purchased at a revenue sale and withdrawn from the warehouse for export, and ruled the point, under a statute which forbade the importation of certain products of

India, that, if the goods had been withdrawn from warehouse, not with the *bona fide* intention to export, but with the intention to return, then that original withdrawal was illegal and rendered the goods liable, and the court says (p. 268): "The circumstance of actual relanding need not be shown, for the case would be vitiated by the original intention with which the goods were taken out of the warehouse."

In the case of *Attorney-General* v. *Towns* (6 Price, 198), defendant was charged with having incurred a penalty under 17 Geo. III, c. 39, sec. 25, for unshipping foreign glass without payment of duty, and for unshipping British glass after having been shipped for exportation, the entering and shipping being for the purpose of obtaining the drawback. The defendant, the master of a homeward-bound vessel coming up the Thames, sent a boat and men, with one of his own crew, to carry off certain boxes of foreign and British glass which were lying on the sands on the Essex coast, for the purpose of landing them at Woolwich. The goods were brought as far as Gravesend, where a customs officer boarded the boat and seized the boxes. Counsel for defendant contended that it was indispensably necessary to prove that the glass had been shipped for exportation and the drawback allowed, and that it had afterwards been laid on land. The court held that the seizure was lawful, and that the "very suspicious circumstances of the transaction warranted the verdict."

The case of *Attorney-General* v. *Tomsett* (2 Crompt., M. & R., 170) decided that an unshipment into a hoy or lighter within the limits of a port was sufficient to

constitute the offense of unshipping before payment of duties. It was not necessary that it be within a county or within the common-law jurisdiction of a country.

The same question was so decided in *Attorney-General* v. *Robson* (5 Exch., 790) and *Attorney-General* v. *Catt* (3 M. & W., 7).

(B) *American.*—In *United States* v. *Gates* (25 Fed. Cas., 1263) there was a conviction under section 2865, but there the goods appear to have been brought to land. In *United States* v. *Martin* (1 Hask., 166, 26 Fed. Cas., 1179) one who aided in smuggling was convicted, but there, too, the goods apparently were landed. The case of *United States* v. *The Express* (25 Fed. Cas., 1035) ruled the point that a discharge of cargo into lighters was not an unloading, but left the goods still within the vessel's control; but there was a permit in this case. The proceeding in *United States* v. *Mills* (26 Fed. Cas., 1260) related to the sentence and fine of a person convicted of smuggling—i. e., with fraudulently receiving, concealing, and facilitating the transportation of smuggled goods—under section 3082. The defendant was convicted under eleven counts relating to importations into Boston, the last cargo being seized at Loring's Wharf, and forfeited. It is not clear from the report whether the goods were actually on the wharf or still part of the cargo on board ship.

In *United States* v. *Nolton* (5 Blatchf., 427), Judge Nelson, in the northern district of New York, was of opinion that the nineteenth section of the act of 1842 does not apply to goods imported from adjacent territory,

which are governed by an earlier act, but that section 4 of the act of 1866 would cover such a case. In *United States* v. *Smith* (2 Blatchf., 127, 130), Judge Nelson uses the following language:

> The offense, in the act of 1842, consists in knowingly and willfully, and with an intent to defraud the revenue, smuggling or clandestinely introducing into the United States merchandise subject to duty, and which should have been invoiced, without paying or accounting for the duty; or, the making or passing, or attempting to pass, at the custom-house, a false, forged, or fraudulent invoice. The act must be smuggling or clandestinely bringing into the United States merchandise subject to duty; and it must be done with a willful intent to defraud the revenue. These are essential elements to constitute the offense, and must be established on the trial to warrant a conviction.

And in considering whether section 1 of the act of March, 1821 (3 Stat., 616), which imposed a penalty for bringing unmanifested goods into the United States from adjacent territory, was repealed by section 19 of the act of 1842, he further says:

> Here both statutes may well stand together, as the acts constituting the offense in the former are not covered by the latter. The former prescribes particular regulations to be observed on the frontiers by the importers of foreign merchandise, with a view to guard the revenue, annexing a penalty in case of a nonobservance. The violation of these comes far short of making out the offense under the latter. Both are directed against the importation of foreign merchandise without payment of the duty, but under a different state of facts and circumstances,

> and prescribing a punishment according to the aggravation of each case respectively. Hence, where the act is done knowingly and willfully, and with an intent to defraud, fine and imprisonment are annexed. * * * The same act committed under different circumstances may be the subject of different degrees of punishment, as an assault and an assault with intent to kill; but it by no means follows that the party is punishable by the infliction of each penalty.

As forfeiture, however, affects property and not the person, there is no reason why both penalties should not be inflicted in this case.

In the forfeiture case of *United States* v. *Two Trunks*, etc. (6 Ben., 218), in which the trunks containing dutiable merchandise only, not invoiced nor entered on the manifest, were found in a locked stateroom of a steamship arriving from abroad after all the passengers and their baggage had been landed, the court said (p. 220):

> The sixty-eighth section of the act [March 2, 1799] necessarily implies that goods subject to duty, found concealed on board of a vessel, may be in a condition to be subject to forfeiture if the duties on them have not been paid or secured to be paid, even though they are seized while still on board of the vessel. Ordinarily, the duties on goods are not necessarily expected to be paid or secured to be paid while the goods remain on board of the vessel. But, where they are found concealed on board of the vessel, and the duties on them have not been paid or secured to be paid, the presumption arises under the statute that an intention exists to defraud the Government out of the duties. The seizing and securing of the goods for trial is authorized if, when searched for,

> they are found concealed. All that the Government is bound to show to make out a *prima facie* case for forfeiture is to show that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer.

The question suggested by this and similar cases, as to the connection between the penal consequence of forfeiture and the criminal situation presented at the point of seizure in intent, attempt, and a substantially completed result, is, does not the argument which holds this form of smuggling offenses to present a *prima facie* case requiring the less grave but penal result (even if also remedial) necessarily draw after it the view that the crime underlying all such offenses has been established *prima facie*, and must be rebutted by proof of innocent intent and of no attempt to violate the laws? May the criminal say: "You have not proved intent, nor any overt act of attempt; but even if you have, my carefully contrived machinery was not in motion when you seized, the goods were not landed, and your remedies on the whole situation ended with forfeiture." The general acceptation of the meaning of the word "smuggling," in its primary sense of a wide range of offenses against the revenue laws, should reasonably affect the technical conception of the crime, which is comprehensive, although some or all of the separate offenses and different steps entering into the process of violation are separately punished. There are certain hints and indications to this effect scattered through the law on the subject.

The title of various acts of a criminal character denouncing various forms of the offense and fixing punishment is, "An act to prevent smuggling," or "further to

prevent smuggling" (act of June 27, 1864; act of July 18, 1866). Certain provisions speak of goods being smuggled, or "in the act of being smuggled" (sec. 4, Anti-Moiety Act; Syn. Dec., 2265, 16617; par. 485, Rev. Cutter Serv. Reg.). Paragraph 9 of section 4596 of the Revised Statutes refers to any act of smuggling of which a seaman "is convicted." The English acts are directed against "persons concerned in importing prohibited or restricted goods, whether unshipped or not" (e. g., 16 and 17 Vict., c. 10, sec. 232); authority is given to officers to board any vessel and, if it shall appear that any violation of law has been committed, to arrest any person engaged in such violation (sec. 2, act of July 18, 1866); masters of light-house tenders are given police powers as to smuggling (act June 16, 1880, 21 Stat., 263); and by section 3 of the act of February 28, 1865 (13 Stat., 441), if there is reason to believe that dutiable goods have been deposited in a building *upon* or near the boundary line of the United States and any foreign country, without payment of duties and in violation of law, besides the right of search, seizure, forfeiture, and removal of the building, the person or persons who have so deposited goods or aided therein are subjected to fine and imprisonment.

We desire to avoid any begging of the question, but submit that such provisions at the threshold, so to speak, tend to show that punitive statutes and other legal provisions are regarding a general crime of smuggling, consisting of various forms and stages, subject to detection, arrest, and punishment at every step;

they do not support the view that if the acts, attempts, and omissions have been revealed and ended somewhere on the path between foreign territory and the custom-house, the course and extent of the transactions have stopped short of the crime of section 2865. By reason of the vigilance of the law, the crime has been detected as it was proceeding. The result intended and sought for by the criminal has been averted; the crime has not been successful, but it has been committed.

Although analogies are often unsatisfactory and sometimes dangerous guides, especially in reference to criminal laws, we submit certain determinations respecting the slave-trade law, in which lack of completion of the crime or of complete preparation for the crime at the other end of the line—that is, at the beginning—are considered.

In the *Emily and Caroline* (9 Wheat., 381), the court, addressing the question of forfeiture of a vessel under the slave-trade acts of March 22, 1794 (1 Stat., 347), and March 2, 1807 (2 Stat., 426), which forbade the fitting, equipping, and preparing vessels for the purpose of carrying on the slave trade, and subjected the vessel to forfeiture and imposed a fine of $20,000 upon the persons concerned in the illegal fitment, using the following language (p. 388):

> And to incur the forfeiture * * * it is said the vessel must be completely fitted and ready for sea; that no state of preparation short of this will satisfy the terms of the law or furnish any certain rule by which to determine when the offense has been committed and the penalty incurred. We can not, however, think that even applying to this law the

most rigid rules of construction applicable to penal statutes it will admit of the interpretation contended for on the part of the claimant.

In construing a statute, penal as well as others, we must look to the object in view and never adopt an interpretation that will defeat its own purpose if it will admit of any other reasonable construction. The object in view by the section of the law now under consideration was to prevent the preparation of vessels in our own ports which were intended for the slave trade. Hence is connected with this preparation, whether it consists in building, fitting, equipping, or loading, the purpose for which the act is done. The law looks at the intention and furnishes authority to take from the offender the means designed for the perpetration of the mischief. This is not punishing criminally the intention merely; it is the preparation of the vessel and the purpose for which she is to be employed that constitute the offense and draw after it the penalty of forfeiture. As soon, therefore, as the preparations have progressed so far as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches. To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete and the vessel ready for sea before she can be seized, would be rendering the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner. The intention * * * must be made out so as to leave no reasonable doubt. * * * We can discover no sound reason for delaying the seizure until the vessels were on the point of sailing. It could only be necessary to render more certain, from their complete fitment, the purpose for which they were to be employed, and if that be satisfactorily ascertained at an earlier stage

> of the preparation, the delay would be useless and evasion of the law rendered almost certain. * * *

The original fine under the slave-trade provisions was $2,000, and then was fixed at the highly penal sum of $20,000 and, by the act of April 20, 1818 (3 Stat., 450; see also secs. 5378, 5551, 5552, R. S.), to forfeiture and a lower fine was added imprisonment. The court, speaking by Justice Story, in the case of *United States* v. *Gooding* (12 Wheat., 460), in answering certain questions certified upon an indictment against the owner of a vessel under the act of 1818, affirm the views expressed in the case of the *Emily and Caroline*, and hold that any preparations for a slave voyage which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, constitute a fitting out within the statute.

So that even after punishment was added to fine, and upon an indictment as well as upon information for forfeiture, it was adjudged that within the language and intention of the act an element of the crime did not need to be completely achieved. Furthermore, since forfeiture and fine are penal and result from a criminal offense—in this case from the crime or misdemeanor of smuggling or attempting to smuggle—it is not perceived why a graver degree of punishment should have the effect of withholding or relaxing the grasp of the law.

It will be said that in the slave-trade cases the preparation itself, whether complete or incomplete, was not merely a step in the offense, but was a distinct part of the crime, or constituted by itself a specific crime, upon which theory the determinations proceed. But if this be

so, we reply that "smuggling" is the crime in our case, not the landing of smuggled goods, and that it is to be urged with equal force that a complete result is no more necessary than a complete preparation in the other case.

The cases construing the neutrality acts present a similar situation, since in those cases also there is not only the penal remedy of forfeiture and fine, but the additional penal sanction of imprisonment of the person, and those cases as well determine that acts of preparation, either from the standpoint of forfeiture proceedings or of criminal prosecutions, need not be completely accomplished. (*United States* v. *Quincy*, 6 Pet., 445, 464; 2 Whart. Am. Crim. Law, 5th ed., sec. 2802, *note;* 2 McClean, 2.)

The mere mailing of a letter, the initial step in a transaction which is not fully completed in reality until the letter is received, fixes civil legal rights and liabilities, and in postal crimes constitutes the offense. (*In re Henry*, 123 U. S., 372; *United States* v. *Grimm*, 45 Fed. Rep., 558; *United States* v. *Duff*, 6 Fed. Rep., 45.)

The decision in *United States* v. *Gooding* (*supra*) considered also (at pp. 469, 473–475) the questions of agency in crime and form of indictment, to which the court is respectfully referred.

Adverting now briefly to the rules of construction of penal statutes and the cases thereon, we have before us an act which punishes one who smuggles or clandestinely introduces into the United States, with fraudulent intent, any merchandise subject to duty, which should have been invoiced, without accounting for the duty. Now, even

in criminal acts the rules of construction require that the language used shall be taken in its ordinary acceptation, unless a contrary intent is manifest. (*United States* v. *Wiltberger*, 5 Wheat., 76, 96; *Same* v. *Morris*, 14 Pet., 464, 475; *Same* v. *Winn*, 3 Sumn., 211; *Same* v. *Hartwell*, 6 Wall., 385, 396; *Same* v. *Lacher*, 134 U. S., 624, 628; *Wiborg* v. *United States*, 163 U. S., 632, 647.) The act does not specify the "crime of smuggling" or indicate in any way that the obsolete common-law distinction is to be imported. The language is, "If any person shall smuggle or clandestinely introduce." There are no common-law crimes against the United States; they are all statutory, and that fact surely requires that our statutory crimes should not necessarily be restricted to the common-law acceptation.

If this is not so then, whatever the language of an act of the nineteenth century may be in its ordinary modern meaning, we must turn the crimes denounced into their antiquated British patterns of two centuries ago, unless a contrary intent is clearly expressed by the terms used. That would be relying on the principle *stare decisis* with a vengeance; and not even that—for the modern English laws have parted company long ago from the common law definition, and it is impossible to find any decisions sustaining it—but it would be to stand on a single enunciation of one commentary copied almost identically into a more recent compendium and into a text book, without any other authority whatever.

It is submitted that this would be mere slavish adhesion to a voice out of the past, from which tendency modern jurisprudence has been during this century

keenly active to free itself. We have endeavored hereinbefore to show, therefore, that the old definition should not control, and that the ordinary legal meaning of the verb "to smuggle" should be accepted in defining what is meant by the crime and in comprehending all which may properly be included therein.

Besides, it seems quite clear that by the addition of the alternative phrase, "or clandestinely introduce," Congress was seeking to negative any vagueness in the word "smuggle" or any doubt based upon the common law requirement, and showed very plainly an intent to indicate a definition which should require no more than secret, illicit, and clandestine introduction within the jurisdictional limits of this country. These words emphasize the evasive nature of the offense and fairly anticipate and include the "attempting" of the anti-moiety act, an attempt so far successful and completed as to have brought the goods within the jurisdiction of the United States. No additional light is cast upon the subject by the debates over the tariff act of 1842, of which section 19 is the original of the statute before the court.

It is not necessary to cite lexicographers for the meaning of the words "clandestinely" and "introduce;" their meaning is clear and definite. "Introduce," used in this sense, is really broader than "import," and "clandestinely introduce" than "import contrary to law;" but they are, at least, as broad and entirely satisfy the requirement (if there is such a requirement in reference to "smuggling") of arrival of the goods within the limits of a port with intent to unlade. They are not a mere

paraphrase and equivalent of "smuggle;" they rather describe and define it, and if it were necessary to enlarge its acceptation and meaning, they do so enlarge, as we here contend. If the court adopt the views of the defense in this case, we respectfully submit that they will entirely ignore and set aside the meaning and effect of the words "clandestinely introduce."

Further, as to the rule of construction, in the case of *United States* v. *Hartwell* (6 Wall., 385), where the question was whether a clerk in the office of an assistant treasurer of the United States was fairly included within the terms of the subtreasury act of 1846, providing among other things against embezzlement by officers and other persons charged with the safe-keeping and disbursement of public moneys, the court say (p. 395 *et seq.*):

> We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. * * * The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. * * * The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature.

The rule of strict construction is not violated by permitting the words of the statute to have their full meaning or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent. [Citing *United States* v. *Wiltberger*, 5 Wheat., 96; *Same* v. *Morris*, 14 Pet., 475; *Same* v. *Winn*, 3 Sumn., 211; 1 Bish. Crim. Law, sec. 123; Bacon's Abridg., title Stat. I.]

5. THE ANTI MOIETY ACT; SECTION 1035, REVISED STATUTES.

These laws raise the questions of the present definition of the crime of smuggling, and of the status of an attempt to smuggle, or to commit the crime of smuggling, under an indictment for smuggling based upon section 2865.

The Anti Moiety Act (18 Stats., part 3, p. 186) was passed upon June 22, 1874, upon the same day that the revision of the statutes was approved, but as the revision related to the acts determined to be in force as of December 1, 1873, the Anti Moiety act was not affected thereby. The act of February 27, 1877 (19 Stats., 240, 247), restored all of section 19 of the 1842 act to the statutes by amending section 2865. It was theretofore perhaps supposed that section 4 of the act of 1866 had supplied and repealed the first portion of section 19 of the act of 1842, on the theory that importation contrary to law included smuggling, even if some of the offenses were separately provided for, and the "smuggling clause" of the act of 1842 was, therefore, or by accident, omitted

from the revision of 1873–74. But the act of 1877 should be held to regard smuggling not as defined by the common law, but as shown by the language and purpose of the act of 1842 itself, even if the act of 1877 was not making any new law, but merely stating the law as it was; and since the definition of the Anti Moiety Act had intervened, that should be held to be in the mind of the legislature, and the act of 1877 not be held to relate back to the situation in 1842, or even beyond it and back to the common-law notion. Mr. Justice Miller in holding in *Bridge Proprietors* v. *Hoboken Co.* (1 Wall., 116, 148) that a word used in an earlier statute or contract need not necessarily include everything to which the word is applied at the present day, did not hold that the word may not include its modern extent.

The Anti Moiety Act provides in the first four sections for compensation to Government officers and informers in lieu of moieties, and the balance of the act relates mainly to procedure in suits other than criminal arising under the revenue laws, and to customs administration, and prohibitions, penalties, forfeitures, and remission of fines thereunder.

By the Customs Administration Act of 1890 certain sections of the Anti Moiety Act relating to administration have been repealed and their provisions supplied, but it may be conceded that the purposes of the Anti Moiety Act referred to in section 4 still exist in their relation to that section; that is to say, the purposes referred to are those subserved by the provisions regarding moieties, and they are still a part of the laws of the United States.

Section 4 of the act provides as follows:

> That whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise in the act of being smuggled or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith, provided that for the purposes of this act smuggling shall be construed to mean the act with intent to defraud of bringing into the United States, or with like intent attempting to bring into the United States dutiable articles without passing the same or the package containing the same through the custom-house, or submitting them to the officers of the revenue for examination; and whenever any person not an officer of the United States shall furnish * * * original information concerning any fraud upon the customs revenue, perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred * * * such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable.

Now, since by section 2 of the act former provisions of the law under which moieties of fines, penalties or forfeitures had been paid to informers or officers of the United States were repealed, it is evident that the main purpose of these portions of the Anti-Moiety Act was to provide a new system of rewards in place of the former system, under which, as was said by Judge Brown in the case of the *United States* v. *Auffmordt* (19 F. R., 893, 898), the attention of Congress had been called to

the subject by abuses in the administration of the revenue laws, the machinery of the law being invoked by agents and informers of the Government for their own benefit to extort large sums of money from merchants for trifling or uncertain irregularities or violations of the law.

Consequently, Congress, in defining smuggling or the offense or crime of smuggling in section 4, were not extending the notion or conception of the crime, but were rather restricting it within narrower limits than had theretofore been fixed. They say, in effect, that while smuggling embraces a variety of acts, transactions, omissions, and attempts, including those which amount merely to trifling irregularities, the offense shall no longer be viewed so broadly as to permit the payment of moieties or rewards in any other cases than where there is the fraudulent act or fraudulent attempt to bring into the United States dutiable articles without passing them through the custom-house or submitting them to the revenue officers. Therefore, inasmuch as Congress did not enlarge the conception of the crime and then restrict it to the purposes of the act, but rather narrowed it for the ends of such restriction, it should be held to stand as a correct statutory definition, now embodied in the laws of the United States, and applicable to any indictment for the crime of smuggling.

While the intention of Congress, as shown by the debates, may not determine the meaning of the act, but the language used must be construed with reference to its meaning under the usual canons of interpretation, we may consider the debates as part of the general history

of the subject, or part of the legislative history, as the subject was presented to Congress. Opinions of this court have supported a certain view of a statute by reference to the debates in Congress. (*Elk* v. *Wilkins*, 112 U. S., 94, 112–114; *United States* v. *Wong Kim*, Ark., 169 U. S., 649, 682, 697.) Extrinsic facts are referred to in the construction of ambiguous statutes, and the purpose and motives of the legislation are sometimes examined, a survival perhaps from times when it was the custom of the judges to go to Parliament and inquire what they meant by the language of an act. (*Spencer* v. *State*, 5 Ind., 41, 48; *American Net and Twine Co.* v. *Worthington*, 141 U. S., 468, 473–4; *Tex. & Pac. Ry. Co.* v. *Interstate Comce. Commission*, 162 U. S., 197, 218; *United States* v. *Laws*, 163 U. S., 258, 262; *Church of the Holy Trinity* v. *United States*, 143 U. S., 457, 463, and cases cited; *United States* v. *Dauphin*, 20 Fed. Rep., 625, 626). And the doctrine of contemporaneous construction is invoked when we give great weight to the writings of Hamilton, Madison, Jefferson, and their contemporaries in resolving constitutional ambiguities. Now, it is evident from the debates that Congress were merely endeavoring to define smuggling so as to exclude from the definition all goods which pass through the custom-house or which custom-house officers might seize if they desired. See remarks of Mr. Beck (Cong. Rec., 43d Cong., 1st sess., p. 4038); and page 4809, Mr. Stewart feared that section 12 would repeal nearly all the general law defining crimes against the revenue by false and fraudulent invoice, and that the only way left in which a person who

fraudulently imports goods could be punished would be by forfeiture of the particular articles and suit in recovery of damages, and in the colloquy between Mr. Conkling and Mr. Sherman, on page 4815, it is evident that the definition was not meant to restrict smuggling to the act or attempt of bringing unenstomed goods into the United States, except in relation to compensation to the informer, but that all the other offenses, such as false and fraudulent invoice, were, in other respects, still to be considered as smuggling.

Mr. Conkling speaks "of the now prevailing definition," and on page 4724 Mr. Sherman says: "I think it is a little clearer definition than the existing law." It seems to be evident from the foregoing that the definition of the existing law to which they refer, although no formal statement can be found, was that definition or notion under which, as shown by the marginal summary scattered through the statutes and by the indices thereof, smuggling was regarded as the illicit or clandestine introduction of goods into the United States by importation without paying duty, and by false entry or fraudulent invoice as well; or else such definition was the definition indicated by the words "clandestinely introduce."

And on page 4720 Mr. Edmunds shows that Congress was restricting and not enlarging by his fear that unless the words "for the purposes of this act" are restrained to the section in which they occur and not applied to the whole act, there will be nothing left of smuggling except the act or attempt specified in section 4. He says "if I only bring them [the goods] to the custom-house, no matter how corrupt my intention may be, no matter

though I may have bribed that very custom-house officer in order to get them through; if I only lay them at his door or bring them into his presence * * * my duty is done, and the law by statute declares that I am not a smuggler, and there is no forfeiture for them."

In the *Claflin Case* (13 Blatch., 178), the court say (pp. 184–185):

> The word "smuggle" is a technical word, having a known and accepted meaning—"a necessary meaning in a bad sense." It implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods, with intent to avoid payment of duty. As such it is used by itself alone, and in the statutes, even. It is used in section 4596 of the Revised Statutes, in a provision relating to seamen, where an "act of smuggling" plainly is supposed to mean such an act as above described, and none other. The word is used in the same technical manner in the English statute (16 and 17 Victoria, chap. 107, sec. 244), where it is deemed sufficiently descriptive of a particular illegal employment in a ship to designate it as "a smuggling ship." This technical meaning of the word has taken the form of a statutory definition in the moiety act of June 22, 1874 (18 U. S. Stat. L., 186), where it is declared that the act of "smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles, without passing the same, or the package containing the same, through the custom-house or submitting them to the officers of the revenue for examination." What is smuggling for the informer when he claims his reward must also be smuggling for the goods as to which he informs.

In *United States* v. *Dunbar* (156 U. S., 185), determining questions arising upon an indictment for smuggling, under sections 2865 and 3082, the court, citing the Claflin Case as a smuggling case with approval, although in reference to the form of indictment, in considering the question of *scienter*, say (p. 193):

> Indeed the word "smuggling," as used, carries with it the implication of knowledge. In Bouvier (vol. 2, p. 528) smuggling is defined: "The fraudulent taking into a country or out of it merchandise which is lawfully prohibited." And such is the general understanding of its meaning. We have, therefore, both the use of a term which implies intentional misconduct and a specific averment that what was done was done willfully, knowingly, and with intent to defraud.

This decision, subsequent to the Anti-Moiety act and the Claflin decision, at least expresses no disapproval of the definition established by them (although the point now raised was not before the court); its language is broad enough to cover inferentially the definition of the Anti-Moiety act, and at all events it announces by the court an approval of the general understanding of smuggling as the fraudulent taking into a country merchandise which is lawfully prohibited or restricted.

In the *Thomas* case (4 Ben., 370), the language of the court is:

> Section 19 of the act of August 30, 1842 (5 Stat., 565), which provides for the punishment of any person who "shall knowingly, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods,

wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty," makes the clandestine introduction or smuggling into the United States of dutiable goods, in cases therein provided for, a criminal offense which is complete as soon as the goods are so clandestinely introduced or smuggled into the United States; but in such cases it is the secret and clandestine manner of the importation, with the intent to defraud the revenue, and not the nonpayment of or not accounting for the duties prior to the importation which constitutes the gist of the offense.

Section 1035 of the Revised Statutes reads as follows:

> In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That such attempt be itself a separate offense.

As to the first clause of this section, the question is to be asked, Is it not an offense, reaching further than the remedy of forfeiture, to bring uncustomed goods within the limits of the United States with fraudulent purpose, and is not this offense necessarily included in that of smuggling and clandestine introduction with which the defendant is charged? We contend that when the evasive nature and preliminary secret acts and omissions of the crime as shown here are studied and the plain purpose of this statute kept in view, the conclusion will follow that the complete course of preparation and the acts and attempts consequent upon it are so merged

in the conception of the whole abstract offense that the former become an inseparable part of the latter, and are necessarily included therein. If this case does not fairly present the situation contemplated by the statute, it is difficult to conceive to what it may apply. It may be said that a felonious wounding on such language would be included in an indictment for assault with intent to kill, wounding having resulted from the assault; or that upon trial of the ringleader of a mutiny, an incitement to mutiny would be included; or unlawful cohabitation on an indictment for bigamy; and that such cases satisfy the statute without extending it beyond its natural and evident scope.

But not all other offenses like the foregoing would necessarily be included in their principals with such aptness as the offenses here in the crime denominated smuggling or clandestine introduction. Some of them would fall under the head of an attempt, and so would present the question under the second clause of the section rather than under the first, and, as will be argued below, the contention based upon certain crimes of violence begun or threatened, but not issuing in an overt act, does not properly apply to this case. Besides, it is difficult to imagine a case presenting more strongly and squarely the issue of criminal acts and offenses leading up to a final *delictum*, or included in it, and, in the sense of the law, constituting a part of it. But it might be urged that the proviso of section 1035 applies in effect to the whole section, and that it could not be permitted to convict the defendant of the offense alleged to have been included,

or of an attempt to commit the offense, unless the included crime as well as the attempt were a separate offense.

Arguing the question broadly, the general subject of inchoate crimes is presented, and the inquiry becomes, Is not an attempt to smuggle a separate offense properly reached by section 1035? The counsel for plaintiff in error argues elaborately that there was no overt act of the crime of smuggling in the case; that there was not even an overt act of attempt, and he seeks to draw back the chain of transactions to his innocent and passive client sitting in the Antwerp café, so that he appears to say that there was no overt act showing an intention to attempt to commit the crime of smuggling.

But we shall not attempt to follow his dialectics here. It is only necessary to point out to the court that the facts establish such acts and omissions, such a course of transaction, as bring his completed attempt to the very door of the custom-house; an attempt made up of many overt acts and the quiescent situation consequent upon them in the necessary character of his scheme, all resulting from his initial acts in Antwerp.

But counsel argue, even if there was such an attempt, that is not a separate offense, and seek to prove from cases respecting assault with intent to kill that mere interrupted intention or abandoned attempt will not justify conviction for attempt upon an indictment for a substantive crime.

The cases reviewed (brief of defendant in error, pp. 59–62) relate to such crimes of violence as assault with

intent to kill, which, like murder, presuppose a definite and sharply defined fact, and not a prolonged series of acts or course of dealing. Ordinarily, in such cases, there is not a scheme, slowly and by many steps matured, but a sudden action, and it has consequently, and no doubt justifiably, been held, under the peculiar circumstances in such cases, that if the definite act of crime does not result, a defendant who has not persevered to an overt attempt or has been diverted from it can not properly be convicted of the sharply defined and individuated principal crime.

If no murder or assault were committed, it might not be possible under the facts to establish an attempt to kill or commit an assault; but the case is very different with smuggling; no view properly regarding the nature of the crime could hold that the ultimate end sought, of secretly landing and having the goods on shore, is all there is in the offense, as the actual killing is the gist of murder. Therefore, in reference to this crime, the attempt should be viewed as a separate offense—that is, the term smuggling properly includes an attempt to smuggle, the landing of smuggled goods, and the still later stage of concealing or selling smuggled goods.

The language of section 1035 is that the attempt shall be "a separate offense;" it does not say "substantive crime." Under the language used it cannot be argued with force that the meaning necessarily is that the attempt must itself be a distinct misdemeanor at common law, or a separate statutory misdemeanor. If "separate offense" means substantive statutory crime, since the defendant argues that attempts are

not made substantive crimes under Federal laws, there is no domain in which section 1035 can operate, and it becomes nugatory, which is not to be allowed.

Referring again to the case of *United States* v. *67 Packages of Dry Goods* (17 How., 85, 93, 96), the court states that the acts of 1799 and 1823 sought to prevent fraud by false invoices, but did not afford the necessary protection, and that the provisions of the act of 1842 were enacted to cover the case subjecting the person to a misdemeanor for the smuggling of dutiable goods into this country and for passing or attempting to pass them upon false invoices, which is an offense akin to smuggling.

The court considers the "whole scope of the section," and in the dissenting opinion by Justice Campbell, although he is speaking especially of misrepresentation by the invoice, he says: "It is admitted that this act provides for cases never before comprehended in any revenue law. For the attempt to defraud is punished as well as the consummate effort. * * * There are, besides, provisions directed against smuggling." Now, since the purpose of these portions of the act of 1842 was as stated by the court, is it not fair to conclude that the words "smuggle or clandestinely introduce" in the same section were intended to follow the purpose shown by the whole scope of the section, and, there being no words to show a contrary intent, or any repugnant limitation of the word "smuggle" (but, rather, the opposite), that they include an attempt to "smuggle," or, as smuggling involves and includes the notion of "attempt," to introduce dutiable goods into the United States without accounting for the duty?

The pertinent provisions of the act of 1842 were preventive in their nature. They were in terms aimed at attempts to smuggle by false or fraudulent invoice, and they were in spirit aimed at attempts to smuggle in other familiar ways, such as the method before us, both of which classes of offenses previous laws had not sufficiently or satisfactorily prevented. The act says "smuggle or clandestinely introduce," but does not say "attempt to smuggle," because the words used include an attempt quite clearly and fairly by the language itself as well as by the spirit and purpose of the provision. Regarding the character of the crime and the preventive purpose of sections 17 and 19 of the act of 1842, we submit that the detection and prevention of attempts to smuggle were part of the purpose of the act, and that a frustrated attempt, such as here, is fully covered by its criminal provisions.

We therefore submit that the facts in this case do not show a mere inchoate crime, resting in intention only, but such an "attempt" as is properly embraced within section 1035 as a "separate offense."

6. THE EVIDENCE, AND THE TRIAL COURT'S APPLICATION OF THE LAW THERETO.

The Government's case was that the defendant was in Antwerp on January 27, 1896, which he himself admits (Rec., pp. 96, 97); that after introduction on that day to Captain Loesewitz at the house of the jeweler Von Hemmelrick, a mutual friend or acquaintance (pp. 23, 100), Keck proceeded with Loesewitz and Von Hemmelrick to the *Café Alsacienne*, on the *Place Vert*

in Antwerp. During the conversation there a small package was taken by Von Hemmelrick from his pocket and shown to the captain with the statement that it belonged to Keck and contained no valuables, which Keck confirmed, and with the request that the captain take it over to America. Upon the captain's question where he should send it, Keck himself wrote the address of T. Van Reeth, Cincinnati, upon part of a card (p. 25), and soon after the parties separated, Keck telling the captain to send the parcel by Adams Express. Keck did not state what was in the package nor explain who Van Reeth was, and the captain did not see him again before sailing.

The captain sailed on the *Rhyndam* January 29. He did not invoice or manifest the package. (Rec., pp. 23–26–27, 37, 40, 73.) On arrival of the steamer at Philadelphia February 11, after the passengers were all ashore, the captain received a call from Gallen and Cummings, the Treasury agents (pp. 27, 34, 43, 59). The accounts of the captain and the two Treasury agents of the interview are substantially the same. The captain's account is as follows (p. 27):

> When I reached the port of Philadelphia * * * two gentlemen entered my room and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, "Yes." I thought those gentlemen came for the package and that they were sent by Mr. Keck, and naturally, on my part, I asked them who they were. They said they were Treasury agents, and said: "Captain, that's a package of diamonds you have got to be sent to Cincinnati," and if I didn't deliver it I would be arrested. After a while I went

down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened.

Mr. Gallen states (pp. 43, 44):

> I spoke of the weather and other topics, and then I said: "Captain" (to whom I was unknown), "you have a package for the Coeterman Diamond Company—the Coeterman-Keek Diamond Company." * * * I repeated the name of the company. He said, "No, I have no such package." I said: "I beg leave to differ with you," and, indicating with my fingers, I said, "you have a small package which you received while in Antwerp." He said: "I have a package for Van Reeth, of 21 West Fourth street, Cincinnati, Ohio, and I will give it to you if you have an order for it."

See also page 52, where Gallen testifies that the captain said, "F. Van Reeth, 21 West Fourth street, Cincinnati." The captain testifies that he never saw F. Van Reeth and does not recollect ever having heard of him or hearing the name until Keek wrote it on the paper (pp. 39, 40, 107).

Upon a further request from the captain for an order, and reply from Gallen that he would like to see the package before delivering the order, the captain, after a few minutes' delay to finish his log, arose and said: "You remain here and I will go and get the package." Gallen followed him, unperceived, from the chart room, where they were, and saw him enter his own room and emerge with a package in his hand. Gallen then said: "Captain, that is the package I want." He said: "Where is your order?" Whereupon Gallen produced his card as United States Treasury agent. After some

demur they went back to the chart room, where the captain finally gave the package to Gallen, and after a search by Gallen of the captain's room and other parts of the vessel he went into the chart room again, broke the seal of the package, and opened it in the presence of the captain (p. 44). Gallen's testimony on these points is substantially confirmed by the testimony of Cummings (p. 59). The box had no address whatever upon it, and turned out to contain 563 diamonds, all cut, and dutiable at 25 per cent, which were subsequently appraised and libeled for forfeiture with due proclamation, no claimant for them appearing (pp. 44, 45, 59, 73, 74, 79). The captain testified that he had put the package in a drawer in his stateroom and the paper or card containing the address in his card case, intending when he arrived to wrap the package in another paper and then put the address on it for transmission (p. 34).

The circumstances of Keck's arrival at New York by the steamship *Aller* on February 14, and Gallen's conversations with him, are shown by the record on pages 46–70 inclusive, by the testimony of Gallen, Cummings, and various customs officials. Gallen testifies that he accosted Keck on board the *Aller* off Staten Island, and had some talk with him, establishing his identity, and shortly afterwards on the dock he held the package so that Keck could not see it and said: "Here's the package which belongs to your firm," to which Keck said: "There is no address on that package" (p. 48). Keck's reply and his inability to see whether there was an address on the box are shown also on the cross-examination of Gallen and by other witnesses (pp. 56, 64, 69).

At the hearing before the United States commissioner, at Philadelphia, on February 18 (p. 11), Captain Loesewitz positively identified Keck (without any prompting) from a number of people standing in the corridor of the Government building in Philadelphia, although he had not previously seen him since the interview at Antwerp (pp. 57, 58), and was not shaken in his identification subsequently (pp. 27, 28, 29, 107). At this hearing, also, the Captain produced the paper given him by Keck in Antwerp, containing Van Reeth's address (pp. 50, 51). He had not produced it at his own previous hearing, becaused he had waived hearing (p. 52). It seems that the writing on the paper was in some foreign language, either French or Dutch (p. 104), and that the conversation in the café with Von Hemmelrick had been in Flemish (p. 24), although Keck spoke in English (p. 40), but seems to have understood Flemish (p. 24).

The court below properly ruled out evidence as to prior smuggling by the captain unless connected with the defendant (p. 35), and (p. 46) declined to admit the declarations of the captain to Gallen the day after seizure of the diamonds, holding that what the captain said when the diamonds were first found may properly be admitted as part of the *res gestæ*, but that subsequent declarations were not evidence against the defendant. The court then admitted Gallen's evidence of the *fact* that the captain on the next day gave a description of the man who had given him the diamonds, overruling an objection of the defendant, and the character of the description, although not the words of the captain's declarations

thereon, was immediately thereafter received in evidence without objection from the defendant. The court sustained the Government's objection to a line of examination by the defense to show that since Keck's firm dealt wholly in rough diamonds and had no use for cut diamonds, he had no motive to smuggle, on the ground that the Government is bound to prove that the special diamonds were smuggled, and that the character of the business pursued by Keck's different firms had nothing to do with the question (pp. 93, 96).

Now, in the facts thus shown by the record we contend that there was very remarkable proof of the Government's case by circumstances which fully confirmed the information which it had received. Laying aside the statements by the captain, which, although not convincingly contradicted, are unsupported (as, for instance, his testimony that he had no previous knowledge of or acquaintance with Van Reeth), he (the captain) has the package or box with seals unbroken and without address; he volunteers that it is to go to F. Van Reeth, 21 West Fourth street, Cincinnati; he describes Keck so that he is easily identified by Gallen on the arrival of the *Aller*, and Keck, although several witnesses state that Gallen so held the box that any address on it could not have been seen, stated to Gallen on the dock at New York that the box had no address on it. Not only is the captain's story corroborated in important particulars by Gallen's evidence of what occurred on the *Rhyland* at Philadelphia, but the subsequent circumstances of identification from the captain's description of Keck, and of Keck's self-betrayal, made the corroboration certain.

Keck's scheme and the very paraphernalia of it, his own deeds and words, started forth to accuse him, and wove a circumstantial chain of proof which is irresistible in its strength, and against which, in the peculiar circumstances of the case, no flaw in fact can be found and no objection in law can be validly sustained. The only real complaint of the court below regarding admission or exclusion of evidence is found in the admission of Gallen's evidence as to the captain's description of Keck on the day following the seizure of the package, but we contend that this complaint is not well taken, because the court had just excluded the captain's subsequent declarations, and the fact that a description had been given and its substance (though not the captain's words) were elicited without objection. We contend that it was clearly competent for Gallen to testify to the mere *fact* that a description was given; this was not only one of the most important and striking elements in the case, but was necessary to be brought out in connection with the subsequent arrest of Keck to show how it was that Gallen knew and identified him immediately. The character of the description, even admitting that it gave the captain's subsequent declarations in effect, was not essential; it might have been excluded without weakening the Government's case and was admitted without serious prejudice to the defendant. The statement that a description had been given, although important, was brought in as a mere fact or incident. (See page 30 original Government brief; the supplemental brief at large, and pages 29 and 30 of the brief upon reargument at October term, 1897.)

It is further to be noted that Captain Loesewitz, although subjected to a very careful and lengthy cross-examination, was not shaken in any respect, and his testimony reveals no contradictions or discrepancies. His story is circumstantial, straight, clear, and positive.

This, then, being the case, what was the application of the law by the court below? The court no doubt was of opinion that such facts when proved constituted the crime of smuggling, as we have argued heretofore, but did not announce this conclusion of law and leave it to the jury to find merely the truth or falsity of the facts alleged. The court submitted the whole question to the jury upon the evidence and under the answers to the points, and in the charge gave proper instructions. The court, therefore, properly refused to affirm the first five points of the defendant, because there was ample evidence of more than an unexecuted intention to smuggle to take the case to the jury, and properly disaffirmed the eighth point, in which the defendant sought to obtain protection because the second count did not allege an aiding or abetting, (which is an alternative offense, applicable to the second portion of the section referring to the passing or attempting to pass a false invoice); and, besides, the evidence showed the defendant to be the principal and not an aider or abettor.

The tenth point submitted that preponderant evidence of guilt is not sufficient unless the jury is convinced beyond reasonable doubt, and that the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence. (See Government brief upon reargument, October term, 1897, pp. 31, 32.)

The court, in affirming this point generally, ascribed to it the meaning that the jury shall be fully convinced from a careful examination of all the testimony that the defendant is guilty of the smuggling charged as testified to by Captain Loesewitz, and both in this answer and in the charge required the jury to be convinced beyond reasonable doubt. And while the court, again in the charge, referred to Captain Loesewitz separately, "It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged," this was said in connection with the introductory sentences of the charge referring to the statutory provisions and the jury's understanding of the law governing the case. Besides, it was not necessary for the court to explain the statutory provisions fully, because this appears already to have been done satisfactorily by the respective counsel.

The words mean no more than to say that such facts, if proved, would constitute smuggling. But this very paragraph shows that the court did not withdraw the legal question from the jury, but committed to them the entire determination of the defendant's guilt of the crime of smuggling as charged in the indictment, and with the language pointing out the captain's interest and bias both in the charge and by the affirmation of the ninth point, taken in connection with the language as to the contradiction of the captain by the defendant and young Van Reeth, and as to the evidence of good character, the following words of the court sufficiently cautioned the jury

and protected the defendant as to the necessity of corroboration of the captain:

> If, therefore, he [the captain] stood alone, unsupported, you would naturally and properly hesitate to convict the defendant on his testimony, especially with the defendant's denial, which you have heard. The Government claims, however, that the captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief can not be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the district attorney very fully, and I need not further allude to them.

Finally, in view of the law respecting the validity of a verdict where one count of an indictment is good, the charge that "if the defendant is found on the evidence to have committed the offense charged in any of the counts, he may be returned guilty," is to be sustained.

We therefore submit that there was no reversible error in the court's application of the law to the evidence.

7. THE OPPOSING BRIEF.

We have noticed herein as the discussion has progressed the arguments advanced by the other side, and now consider some points which appear to be specially emphasized.

On pages 13 and 14 of the brief of defendant in error at this hearing it is argued that the word "smuggle" must be given its meaning at common law, but the authorities cited go no further than to hold that the common law furnishes a proper rule of interpretation (for instance, as to what "personal goods" means) where a

word or phrase used in it has a clear, definite, and precise meaning, and that a penal statute should not be held to embrace language not fairly within its letter and spirit, so as, for instance, to render words merely vulgar "obscene" or "lewd."

The decision of Justice Story in *United States* v. *Smith* (5 Wheat., 153) states that Congress when defining crimes may do so either by a reference to crimes having a technical name and determinate extent or by enumerating in detail the acts to be punished. But the known and determinate meaning, when the act of 1842 was passed, is the very question at issue at this point, and we have argued that there was no definite and settled meaning at common law by a long course of decisions or numerous authorities. And on pages 22–25 counsel contend for the application of the rule of strict construction and of collecting the intention of the legislature from the words they employ. But with the rule is to be remembered the qualifications which it bears, either expressly or by implication, as is sufficiently shown by the authorities invoked. There is, it is true, no room for construction where there is no ambiguity. But while we contend that the normal meaning of the word "smuggling" and the existing statutory definition, as well as the alternative phrase in the act, tend to remove or have removed the ambiguity so as to sustain the Government's contention, apart from these elements so much that is ambiguous exists in the subject as to the extent and comprehensiveness of the term that there is abundant room for construction with all the qualifications and conditions which are drawn after the rule.

Thus, as may be gathered from the language of the court in *United States* v. *Chase* (135 U. S., 255), while the rule of construing statutes with reference to the evil they were designed to suppress does not apply to instances which are not embraced in the language of the act, the rule, nevertheless, is of aid in ascertaining the meaning of language which is ambiguous and susceptible of conflicting constructions, and may apply to instances which are implied from a fair interpretation of the context of the statute. In our case, we contend that the purpose of the statute and the context of the smuggling clause, with the use of the words "clandestinely introduce," really do not require any implication, but present clear proof that the offense of smuggling does not necessitate the landing of smuggled goods.

Although counsel seem to concede that if the first count of the indictment were in form acceptable to their scrutiny a conviction might have been had thereunder upon the facts in the case, we think we should then have been met by the contention which they indeed make, that importation contrary to law does not mean that duty should be paid or accounted for before the goods are landed—and we would then be confronted by an additional element in the dilemma which is held to cast a barrier of protection around this case, and which may be stated about as follows: The captain did not manifest the goods, it is true, but the failure to do that is especially provided for in the law—that is not smuggling and Keck was not guilty of it.

The goods were not found concealed in Keck's baggage, nor, as a matter of fact, in the captain's baggage. The offense of concealing goods in baggage is separately punished. That does not constitute smuggling. At all events, Keck was not guilty of that offense. The count of the indictment seeking to make him so was held to be invalid, and although the goods were not concealed in the captain's baggage, they need not have been invoiced, because they are to be considered, notwithstanding, personal effects accompanying him as a passenger, and his failure to declare them as such need not be regarded by us, and *non constat* that he would not have at least reported them later; and as to the goods being imported contrary to law, it does not follow because they were imported that the duties would not have been paid in due time, when the captain reported them, as was his use, to the custom-house officials. If importation contrary to law refers to offenses other than smuggling in our sense and the introduction of prohibited goods, such as failure to manifest or failure to invoice and enter, or as invoice and entry upon fraudulent and false papers, those offenses are all separately provided for, and, besides, defendant has not committed them.

Such chameleon-like proceeding really underlies the defendant's contentions in this case, and utterly fails to take into account the fact that one may commit a misdemeanor or a series of misdemeanors through an agent or accomplice, and when standing aloof from the jurisdiction in which it actually occurs, or where it finally reaches its climax; and entirely ignores the action, the secrecy and

nonaction essentially a part of this crime, and the various steps and attempts by which the machination was launched and carried on in the course to its desired result. All the acts were done, in effect, by Keck, and together they constitute the offense of smuggling by him, no matter how many separate offenses they may include, for which others than himself are also responsible.

It is true that words may not be superadded to existing laws by the court where the addition would defeat the intention of Congress, as manifested by the language it selected to indicate its purpose; but this view of the court in the case of the *Bate Refrigerating Co.* v. *Sulzberger* (157 U. S., 1), as well as the statement that the language in the act then in question is so plain and unambiguous that refusal to recognize its natural and obvious meaning would be to change the law by judicial action, does not affect the principles upon which we are seeking to construe the term "smuggling" in the case before the court. We are adding no words to the law, and the term, if the Government's contention as to its clear meaning and extent is not to be accepted without close scrutiny, is sufficiently ambiguous to require examination and construction.

The entire argument that there was no act of smuggling or act of attempting to smuggle—that it is repugnant to charge a person with having done an act and at the same time with an attempt to do it—brushes aside the facts here, fails to reckon with the nature of smuggling as embracing acts and attempts and a secret scheme or method, and is finally lost in the mazes of overt acts of intention and preparation to attempt to commit the act

of smuggling. Having, on page 57 of the brief, reached a "tenth step in the preparation," counsel contend that the various stages of crime were merely preparation and that not one of them nor all of them put together constitute an act of smuggling or attempt to smuggle, and that therefore the crime of smuggling is nonexistent in the case. Although counsel seek to show the contrary, it should be remembered that the captain offered to deliver the package to men whom he believed at first to be the representatives of Keck. Was not this contemplated and attempted delivery an overt act? To what extent are overt acts, or the ultimate overt act, necessary in this crime?

Smuggling often consists not so much in doing as in leaving undone, and in every ordinary case secrecy and nonaction, when disclosure is a duty, constitute the overt act. The argument on the other side smacks too much of refined subtlety and passes far beyond the reasonable strictness of criminal law requirements. We urge, therefore, that the scheme, with its various overt acts, not the mere preparation, was interrupted or stopped only in the sense that it failed to bring about the result sought, of landing the smuggled goods. In that sense the consequences of the principal crime were averted, but the crime was committed. The attempt, then, revealed by the interruption of the captain's programme was an interrupted overt act—an interrupted series of overt acts done after all acts of preparation of the scheme devised in the defendant's brain and carried out by his hands in pursuance of the initial intention had been completed.

With reference to such crimes as attempt to assault or to discharge firearms with intent to kill or maim, the authorities cited by counsel on pages 59–61 really sustain our position. In *People* v. *Murray* (14 Cal., 159), the court declared that preparation consists in devising or arranging means, and attempt is direct movement toward commission. And in the case of *Mulligan* v. *People* (5 Parker's Criminal Rep., 105), the court approves Bouvier's definition of an attempt as an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design, and adds that it is not always easy to determine where the line is which separates a preparation from an attempt. Remarking that this is peculiarly difficult with reference to smuggling, we have to say that the vice of the opposing argument is that it postpones too much, so to speak, the whole chain of circumstances. It ignores the gap (where preparation properly resides) between the intention and the occurrences at and after the scene in the Antwerp café, and asserts that preparation began there. On the contrary, the "devising and arranging of means," the packing of the box, and the plan to involve the captain were the preparation, and the occurrences in the café were the beginning of the "direct movement toward commission" and constituted the attempt, or part of the attempt at least.

Barclay's Digest of the Law of Scotland (Edinburgh, 1865, p. 199) contains the following reference to attempt as an offense:

> Dole or evil intent is essential to crime, but is to be inferred or gathered from the whole circum-

stances. * * * An attempt (*conatus*) to commit a serious crime, clearly shown by acts, is itself a crime.

Chapter XXII, of Stephen's History of the Criminal Law of England (vol. 2, p. 221), considers the subject of incitements, attempts and conspiracies to commit crimes. The writer states that the facts to which the law has to be applied must always, from the nature of the case, be more or less as follows: The crime must first occur to the mind; it must then be considered and determined upon; preparations more or less extensive must, in most cases, be made for it, and it must be carried into execution. The execution may either be prevented or may be fully carried out, in which case it may either accomplish, or fail to accomplish, the full object which the criminal proposed to himself. * * * Many actions which under any circumstances would be regarded as crimes are in the nature of attempts to commit some further crime. For instance, every crime against the person must of necessity involve an assault. Forgery and coining are attempts to defraud, though they may not in fact produce the desired result; and the same remark applies to perjury.

After stating the rule obtaining in Coke's time that offenders who had clearly shown their intention to kill should be punished as for murder, though their object was not carried out, which rule, however, appears to have been considered too severe and to have fallen into disuse, he points out that the doctrine that an attempt is an offense as such has been established from an early day,

and that the discretion allowed courts in regard to punishment obviates the difficulty which the disuse of the old rule because of its severity presented; and he proceeds to say that the law as to what amounts to an attempt is of necessity vague; that it has been said in various forms that the act must be closely connected with the actual commission of the crime, but that no distinct line upon the subject can be drawn, some decisions having gone a long way toward treating preparation to commit a crime as an attempt, and one case having held that an attempt is not the less a crime because the offender voluntarily desists. He also shows that with some exceptions civil codes do not punish attempts to commit offenses which would be described in English law as misdemeanors; and that the French and German rules are that in order to constitute an attempt there must be a "commencement of execution;" and that when an offender voluntarily desists, continental law treats as mere acts of preparation many things which in England would be regarded as attempts; but that, on the other hand, it is only in very recent times that the voluntary desisting has been regarded in England, and the English courts have drawn the line between acts displaying a criminal intent and acts amounting to a commencement to execute the intention; and he is of the opinion that the distinction must, in the nature of things, be indefinite; and thinks that while it is not easy to say upon grounds of expediency whether it is or is not wise to lay down the rule that an attempt from which a man voluntarily desists is not a crime, it would be dangerous to lay down such a rule universally; and in conclusion, he refers to the crimes which it is impossible to attempt

to commit, as, for instance, high treason by imagining the king's death, because the crime consists in displaying by an overt act a treasonable intention. Similarly a man could hardly attempt to commit perjury, riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault.

On page 68 it is argued that smuggling is not importing contrary to law, but smuggling, whatever else it may involve or require, if anything, besides mere technical importation, is certainly one form of importation contrary to law. And if upon the theory that full force and effect is to be given to all the provisions of the law, and the language of one section restricted so as to give full effect to another section, it is held that section 3082, which is directed against importing contrary to law, does not cover smuggling, upon this argument most if not all cognate frauds on the revenue would be excluded from section 3082, because they are elsewhere provided for, and that statute would cover only prohibited goods as intimated in the *Thomas Case* (4 Ben., 370), although Justice Strong in the case of the *Nine Trunks* (27 Fed. Cas., 161) declined to concur in this view, and held distinctly that dutiable goods were in contemplation of Congress in the act of 1866, and that unless it covers the illegal importation of dutiable articles as well as the introduction into the country of goods the importation of which was prohibited, there exists no penalty for smuggling dutiable goods into this country.

It is true this decision was rendered during the time when the clause as to smuggling and clandestine introduction in section 19 of the act of 1842 was omitted from

the revision, but if this is urged as a reason for not extending section 3082 to smuggling, the question arises, since section 2865 now stands as it does and most or all forms of irregular and illegal importation, except the introduction of prohibited goods, are covered by distinct provisions of the statutes, Does the importing contrary to law of section 3082 refer only to prohibited goods? Considering the evasive nature and secret methods of these offenses, and, in view of these, the difficulty of meeting the defense that devices and transactions which have really passed into the region of preparation and attempt are still covered by the mantle of mere inchoate intention, shall the evident anxiety and endeavor of Congress, shown by all the provisions, to leave no loophole, be disregarded at the behest of highly technical objections? Can these provisions in no sense and to no degree overlap, so to speak?

Upon pages 73 and 74 counsel refer to the eight elements of the crime, all of which we contend exist in this case, and argue that the captain was a passenger and the diamonds personal effects accompanying him, and that therefore, under the exception of section 4 of the Customs Administrative act, an invoice was not required. The decision of Justice Nelson in *United States* v. *Nolton* (5 Blatchf., 427) merely held that under the then existing laws goods coming from an adjoining foreign country did not require to be invoiced, and hence that section 19 of the act of 1842 did not apply to that case. The only answer necessary to make to counsel's argument is that these diamonds were merchandise and not personal effects, and that "passenger" in the act means one who

goes on board ship to be transported to his destination, and when it is reached leaves the vessel, and does not mean and include the captain, who periodically comes and goes on the same vessel as master and navigator.

As to the *corpus delicti* (pp. 76, 77), there can be no doubt that the package was positively identified as the one which was handed to the captain at the Antwerp café. The circumstances that the package had no address (to which Gallen testified and as shown upon its production with its wrappings in court) and that the captain, however, testified (Rec., p. 34) that he put the paper containing the address afterwards with the package in another paper and wrote the address on himself, are of no moment. Whatever temporary confusion may have existed in the captain's mind at the point when he so answered, he testified repeatedly, before and after, upon cross-examination and in response to the court, that he had kept the box or package and the card with the address separately, the former in a drawer on board the *Rhyland*, the latter in his card-case, and he explained the answer referred to, in reply to a further question of the court, by stating: "I left off the address besides, and it was my minding to wrap that package in another paper when I arrived here and then put the address on it; I intended to do that."

III.

CONCLUSION.

We respectfully refer the court to the previous Government briefs as to the form of the counts, particularly to pages 10 and 11 of the brief at the hearing of the

October term, 1896, and pages 5 *et seq.* of brief upon reargument at October term, 1897; and, regarding the refusal of a *dedimus potestatem*, to Section IV (beginning at p. 23) of the original Government brief.

If there was any error in the sentence, it may be remedied under the authority of *Ballew* v. *United States* (160 U. S., 187), by remand to the district court with instructions to enter a valid judgment, as by a term of imprisonment for a year and a day, instead of a year simply.

We submit to the court that smugglers by such methods, running only the risk (which does not involve a personal penalty) of finding a complaisant and corrupt captain, who will dare the detection of unmanifested goods, and the still more doubtful risk of the penalties for goods concealed in baggage, may stand upon the decks of steamers at our wharves and defy the customs authorities on the dock and say: "Forfeit the goods if you like, but I shall not land them and you can not touch me." Because the various secret steps of the transaction, whether a conspiracy or not, are obnoxious to the law and separately drawn down penalties, fines, forfeiture, and sometimes imprisonment, shall the aggregate offense, the substantially completed series, constituting a combination of criminal conduct both by deed and omission, for which the sanction of section 2865 forms the ultimate coping to the wall of barrier, go without adequate punishment?

The following language of the dissenting opinion in a recent case in this court (*Crain* v. *United States*, 162 U. S., 625), wherein the special question was as to form of indictment and whether one count in an indictment,

referring to matter in a previous count which is not good, thereby loses the reference, is generally pertinent to this case (p. 646):

> At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe if not cruel penalty should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defense against prosecutions which might otherwise be successful and which at the same time ought not to succeed. These times have passed and the reasons for the strict and slavish adherence to mere form have passed with them.

And Justice Story in the Gooding Case (12 Wheat., 460, 475) says:

> The rules [as to certainty in indictments] which regulate this branch of pleading were sometimes founded in considerations which no longer exist, either in our own or in English jurisprudence, but a rule being once established it still prevails, although, if the case were new it might not now be incorporated into the law. So, again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. * * * But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be

decided very much upon its own peculiar circumstances. * * * There is great good sense in the rule which has been laid down, that where the offense is made up of a number of minute acts which can not be enumerated upon the record without great prolixity and inconvenience and the danger of variance, they ought to be dispensed with.

Certainly these views may be applied with force to the demand for the antiquated and inapt common law definition of the many-sided crime of smuggling as well as to the work of the pleader.

Considering, then, all the elements of the case, the character of the crime, the natural meaning of the word "smuggling," the fair import, extent, and inclusion of the language of sections 2865 and 3082, the effect upon their interpretation of the evil to be remedied, the intent of the legislature, and of recent definitions promulgated before section 2865 was established in our statutes; and considering, also, the proved facts in this case and the terms in which the court submitted it to the jury, we respectfully submit that this court will properly vindicate justice without striking at innocence, will uphold the administration of the law, and punish a crime which is grave in its nature and peculiarly difficult to reach and detect, by affirming the judgment below.

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